IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1061 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MONPARA BRIJESHKUMAR VITHALBHAI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 1061 of 2004

Mr. P.M. Thakkar, Senior Advocate, with
MR PRADEEP PATEL for Petitioner No. 1-15
Miss. Mita S. Panchal, Assistant Government Pleader
for Respondent No. 1-2
MR SP HASURKAR for Respondent No. 3
MR AR MAJMUDAR for Respondent No. 4

CORAM : HON'BLE MR.JUSTICE K.M.MEHTA

Date of decision: 06/07/2004

C.A.V. JUDGEMENT

1. Monpara Brijeshkumar Vithalbhai and others have filed this petition before this Court under Article 226 of the Constitution of India with a prayer that this Court may issue a writ, order or direction in the nature of mandamus quashing and setting aside the communication dated 8.8.2003 issued by the Director of Education, which is at Annexure "F" to the petition. By the impugned communication dated 8.8.2003, the Director stated that, as far as Rajkot Homeopathy Medical College, respondent No.4, is concerned, the admission given to the petitioners for the Academic Year 2002-2003 on NRI (Non-Resident Indian) seats or NRI sponsored seats is not as per the Government Regulations Nos. 1 and 2. In view of the same, the admission given by the Rajkot Homeopathy Medical College (hereinafter referred to as 'College') to the students is illegal and the College must inform the students accordingly. The petitioners have challenged the said action along with another Resolution issued by the Government of Gujarat on 7.12.1999. It is the case of the petitioners that the said Resolution is contrary to and inconsistent with the principles laid down by Honourable the Apex Court in T.M.A. Pai Foundation vs State of Karnataka reported in [2002] 8 SCC p.481. The petitioners have further prayed that this Court may direct the Registrar, Saurashtra University, respondent No.3, to enroll the petitioners as students of the Saurashtra University, Rajkot, to take their examination and declare the results of Bachelor of Homeopathy Medicine and Surgery [BHMS] Degree Course of the petitioners who are given admission in the College on NRI/NRI sponsored seats for the Academic Year 2002-2003.

2. The facts giving rise to the present writ petition are as under:

2.1 The petitioners are students in the age group of 18 to 19 years who on aspiring to pursue five and half years degree course in Homeopathy known as B.H.M.S., applied to Rajkot Homeopathy Medical College, Rajkot, to grant them admission on successfully clearing their 12th Standard Higher Secondary Certificate Examination. It is the case of the petitioners that the College is recognized by the Central Council of Homeopathy, New Delhi, and affiliated to the Saurashtra University, Rajkot. It is the case of the petitioners that the petitioners were admitted to the course on seats reserved for NRI or NRI sponsored candidates. The 1st year degree course in which the petitioners are admitted commenced from 18.11.2002 and out of its 5.1/2 years duration, period of over one year is already completed. The names

of the petitioners are shown in the statement at Annexure "B" to the petition. It is the case of the petitioners that the petitioners have prosecuted their studies in the first year degree course and all of them have required number of days of attendance. The College forwarded the names of the petitioners to the University for the purpose of enrolment with the University. The University has refused to enroll the names of the petitioners saying that the admission given to the petitioners is not as per the Rules and the Government communication dated 8.8.2003.

3 When the matter was placed before this Court for hearing, the learned advocate for the petitioners has relied upon the judgment of the Apex Court in the case of T.M.A. Pai Foundation (supra) and also the judgment of the Apex Court in the case of Islamic Academy of Education and another vs. State of Karnataka and others, reported in (2003) 6 Supreme Court Cases 697, and also the judgment and order dated 21.4.2003 passed by this Court (Coram: A.R. Dave, J.), in Special Civil Application No.4687 of 2003, in the case of Soni R. Ashwinbhai vs. State of Gujarat, wherein, in identical situtation, the Court (Coram: A.R. Dave, J.) had admitted the matter and granted interim relief. Relying upon the same, this Court has admitted the matter and granted interim relief.

3.1. This Court passed orders from time to time, namely, orders dated 27.1.2004, 29.1.2004, 26.2.2004, and other orders, by which the petitioners have been protected during pendency of the writ petition.

4. The petitioners have made following submissions and invited the Court's attention to certain salient features in this behalf.

4.1 The Government of Gujarat pursuant to the judgment of the Apex Court in the case of Unni Krishnan J.P. vs. State of AP, reported in AIR 1993 Supreme Court 2178, decided to regulate the procedure of admission by appointing three member committee consisting of (i) Principal of the College concerned (ii) Managing Trustee of the Trust running the college and (iii) officer appointed by the State Government. The advertisement used to be given in the newspaper inviting application from all the students of science stream who are meeting with the eligibility criteria fixed by the Central Council of Homeopathy, New Delhi, being the apex body authorized to lay down the eligibility criteria for

admission in the first year degree course in Homeopathy Science.

4.2. After release of the advertisement and receipt of application forms from the 12th pass students, provisional admission as per eligibility used to be given to the students in respective self finance Homeopathy Colleges subject to the approval of the three member committee for each college. It is the case of the petitioners that the constitution of the committee was delayed every year due to late nomination of a member by the State Government. However, the fact remains that every year three member committee in each college used to finalise the admission given in Homeopathy Medical College according to the merit of marks obtained by each student.

4.3 Learned advocate for the petitioners submitted that a Public Interest Litigation, being Special Civil Application No.4087 of 1997, in the case of National Students Union of India vs. State of Gujarat, was filed before this Court. In that case, the Division Bench of this Court (Coram: the Acting CJ R.A. Mehta and Mr. Justice N.N. Mathur), by order dated 8.7.1997, in paragraph 4, directed that the admissions will be granted only by the Committee comprising of three members as appointed and only the candidates selected by the said Committee shall be admitted. The learned advocate for the petitioners submitted that this order was confined only to 85% of seats and not for 15% NRI seats as per the order of this Court (Coram: K.R.Vyas, J.). It is further submitted that a Government Resolution was also issued on 7.12.1999, wherein, a Committee of three members was appointed in this behalf.

PROCEDURE OF GIVING ADMISSION ON NRI SEATS IN EACH OF THE HOMEOPATHY MEDICAL COLLEGES.

5. The petitioners submit that, until 1998, no management of any self finance college thought it necessary to fill up few seats from amongst NRI or NRI sponsored students charging different amount of fee as per the decision of the Supreme Court. It is the case of the petitioners that even otherwise so many seats used to remain vacant on charging regular fee prescribed by the State Government for free seats and payment seats. However, a petition came to be filed by the Homeopathy College Management being Special Civil Application No.9942 of 1998 praying before this Court to direct the respondent-State Government to allow the management of

Homeopathy College to fill up 15% seats of total intake capacity as was done in case of other faculties in higher education pursuant to the decision of the Apex Court in the case of Unni Krishnan (supra) and further interim orders passed in the case of T.M.A. Pai Foundation (supra).

5.1 The petitioners submit that, accordingly, this Court (Coram: K.R. Vyas, J.) passed an order on 15.12.1998 in Special Civil Application No.9942 of 1998 in the case of Parul Arya Seva Mandli vs. State of Gujarat. The learned single Judge of this Court, relying upon the judgment of the Apex Court in the case of Unni Krishnan (supra) and further interim orders passed by the Apex Court on 14.5.1993 in this behalf, has observed in page 3 as under:

5.1.(i) "In view of this direction, it is clear that the management of the institution is required to admit the NRI students by fixing the quota for that at 15%.There is no dispute to the fact that the main petition is pending in the Supreme Court and even for the subsequent year also, the management have complied with the direction of the Supreme Court by fixing 15% quota to the NRI students. In this view of the matter, the petitioner is justified in making reservation of 15% seats for NRI students or NRI Sponsored seats in the colleges run by the petitioner."

5.2 After referring to the judgment of the Supreme Court in Unni Krishnan (supra) and also above judgment of this Court in other matters, the State Government issued a G.R. dated 7.12.1999 stipulating two conditions for grant of admission by the college management on NRI seats, namely:
(1) Management will be entitled to charge only US 2000 (two thousand) dollars from the student seeking admission on NRI seat and
(2) the decision to give admission on NRI or NRI sponsored student will be taken by three member committee consisting of (a) Principal of the College concerned, (b) Trustee of the Trust and (c) Director of the Indian System of Medicine and Homeopathy. A copy of the Resolution is at Annexure "C" to the petition.

5.3 The petitioners submit that, in case of giving admission to the students on NRI seats, an advertisement was given in the newspaper by the respective management inviting application from students willing to take admission on NRI or NRI sponsored seats. The college managements used to give provisional admission to the

students subject to approval of the three member committee. In no case, where admissions were given on NRI seats, the committee could be constituted before one year to finalise admissions. It is the case of the petitioners that delay used to occur due to late nomination of a member by the State Government. However, the fact remains that, all the admissions given in Homeopathy College until 2001 on NRI or NRI sponsored seats were sanctioned by the three member committee.

5.4 The petitioners submit that because of the orders passed by this Court in two writ petitions under different subject matters, from the year 1999, all Homeopathy Colleges were included under centralized admission system for the purpose of giving admission in the Homeopathy Medical Colleges. The State Government decided to keep 50% seats as free seats and 50% seats as payment seats out of total seats sanctioned by the Central Council of Homeopathy for giving admission in the first year degree course. The State Government, however, continued to allot every Homeopathy College 15% seats out of 50% seats earmarked as payment seats depending upon the intake capacity of each college. The permission was granted to the Homeopathy Colleges as per GR dated 7.12.1999 for filling up 15% seats from NRI or NRI sponsored students and the same was extended till further order vide GR dated 3.6.2000.

5.5 The petitioners submit that Homeopathy Colleges were required to follow same procedure as prescribed in GR dated 7.12.1999 for the purpose of giving admission on NRI seats as per the eligibility criteria fixed by the State Government. After adoption of centralized admission system for the purpose of giving admission to the students in Homeopathy Colleges along with other faculties, the college management used to give advertisement in newspaper inviting applications from the students seeking admission on NRI or NRI sponsored seats. In the present case also, the college management gave advertisement in the newspaper for giving admission on NRI or NRI sponsored seats, and, pursuant thereto, the petitioners applied for admission in the college and the same was granted to them.

5.6 The petitioners submit that prior to completion of one year or at time more, that the Committee could be constituted to finalise the admission given on NRI seats. The delay if any in constitution of three member committee was due to inaction on the part of the State Government to nominate one member for the committee of three members according to condition No.2 of GR dated

7.12.1999. However, the fact remains that even after including the Homeopathy Colleges under centralized admission system, the three member committee sanctioned and finalized all provisional admissions given on NRI seats by respective college managements for the purpose of enrolment of the students with the concerned University.

5.7 The petitioners submit that after 1999 and until 2001, 85% seats of each college were filled under centralized admissions system and 15% seats were filled by the management as NRI quota seats and that, Homeopathy College in which the petitioners are given admission was included in the scheme. The State Government has not framed any separate rules for giving admission to the students in the faculty of Homeopathy Science and, hence, as per the resolution of the Government, the admission process was undertaken.

5.8 The petitioners submit that the admission procedure for giving admission on 85 seats (as intake capacity of the college in which the petitioners are given admission is 100 seats) started somewhere in the month of September 2002 and completed in the month of January 2003. On remaining 15% NRI or NRI sponsored seats, the petitioners took admission in the Rajkot Homeopathy Medical College and, since then, the petitioners are regularly prosecuting their studies.

5.9 The petitioners submit that, as per the prevalent practice in each Homeopathy Medical College for taking decision to give admission on NRI seats, a Committee was required to be constituted for approving the provisional admission given by the college. The college management forwarded a list containing the names of the petitioners who were given admission on NRI seats, as required by the State Government by letter dated 4.12.2002. A copy of the said letter dated 4.12.2002 is at Annexure "D" to the petition. Again by letter dated 17.11.2003, the Director of Education requested the College to forward the list as per the format attached to the said letter. Pursuant to that, the Principal of the college also addressed a letter to the Director of Education dated 21.11.2003 giving details of admission for the year 2002-03. A copy of the said letter dated 21.11.2002 is at Annexure "E" to the petition.

5.10 The petitioners submit that, in view of these correspondence, the matter was closely pursued by the college management to finalise the admission given to the petitioners. Neither name nor member to represent the

State Government on the committee as member according to GR of 1999 was conveyed to the Institution and the issue remained unfinalised.

5.11 The petitioners were shocked and surprised when the Director of Education addressed communication dated 8.8.2003 and directed the College to communicate the decision to the petitioners. It may be noted that, by the said communication, the State Government took decision not to approve admission given to the petitioners. The concerned Saurashtra University was also asked not to enrol the names of the petitioners with the University and, accordingly, the University has also refused to enroll the name of the petitioners with the University. A copy of the said letter dated 8.8.2003 is at Annexure "F" to the petition. Being aggrieved by the impugned order/communication dated 8.8.2003, Annexure "F", the petitioners have filed the present petition before this Court challenging the said communication.

6. The aforesaid action of the State Government has been challenged by the petitioners on various grounds. It is the case of the petitioners that the impugned decision is based on the earlier resolution dated 7.12.1999 as well as 5.9.2002. It may be noted that 7.12.1999 resolution specifically refers to the judgment of the Apex Court in the case of Unni Krishnan (supra) as well as the judgment of this Court in Special Civil Application No.9942 of 1998 in the case of Parul Arya Seva Mandli (supra) which I have referred earlier in this behalf. It is the case of the petitioners that each college imparting higher education in the field of science and technology is provided 15% seats of its total intake capacity. The college of the petitioners was sanctioned 100 seats for the year 2002-2003 by the Central Council of Homeopathy, New Delhi, and, accordingly, the petitioners' college was entitled to fill up 15 seats on NRI or NRI sponsored seats.

6.1 The petitioners submitted that the decision of the Apex Court in the case of Unni Krishnan (supra) provides fee structure as well as admission procedure in private recognized/affiliated educational institutions. The said decision also provides principles of right to education, right to establish educational institutions and impart education and right to recognition/affiliation. The decision of the Apex Court also indicated that in the professional colleges 50% seats should be 'free seats' to be filled in on merit by the Government or the University and remaining 50% seats (payment seats) for candidates willing to pay the higher

prescribed fee, allotment being on inter se merit. No quota for management/promoters is to be kept. The competent authority alone should conduct all admissions/common entrance examination for entire State.

6.2 The petitioners submitted that the ratio-decindi of the aforesaid judgment has been overruled by the eleven-Judge Bench of the Apex Court in the case of T.M.A. Pai Foundation (supra). The Apex Court in paragraph 36 observed as under:

6.2.(i) "36. The private unaided educational institutions impart education, and that cannot be the reason to take away their choice in matters, inter alia, of selection of students and fixation of fees. Affiliation and recognition has to be available to every institution that fulfils the conditions for grant of such affiliation and recognition. The private institutions are right in submitting that it is not open to the Court to insist that statutory authorities should impose the terms of the scheme as a condition for grant of affiliation or recognition; this completely destroys the institutional autonomy and the very objective of establishment of the institution."

6.2.A In paragraph 45, the Apex Court, in terms, did not approve the decision in Unni Krishnan case relating to the grant of admission and the fixing of the fee. In paragraphs 68 and 69, the Apex Court observed as under:

6.2.A(i) "68. It would be unfair to apply the same rules and regulations regulating admission to both aided and unaided professional institutions. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forego or discard the principle of merit. It would, therefore, be permissible for the university or the Government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State/University and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the State agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the

Government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges. The same principles may be applied to other non-professional but unaided educational institutions viz. graduation and post graduation non-professional colleges or institutes.

6.2.A.(ii) 69. In such professional unaided institution, the management will have the right to select teachers as per the qualifications and eligibility conditions laid down by the State/University subject to adoption of a rational procedure of selection. A rational fee structure should be adopted by the management, which would not be entitled to charge a capitation fee. Appropriate machinery can be devised by the State or university to ensure that no capitation fee is charged and that there is no profiteering, though a reasonable surplus for the furtherance of education is permissible. Conditions granting recognition or affiliation can broadly cover academic and educational matters including the welfare of students and teachers."

6.3 The aforesaid judgment in the case of T.M.A. Pai Foundation (supra) has been followed and the same principle is reiterated by the Apex Court in the case of Islamic Academy of Education and another vs. State of Karnataka and others, reported in (2003) 6 Supreme Court Cases 697. The learned advocate for the petitioners has relied upon paragraph 21 (page 730), paragraph 70 (page 749), paragraph 4(ii) (page 750) [wherein the Apex Court has further observed that the decision in Unni Krishnan has been overruled], paragraph 73 (page 751), paragraph 86 (page 756), and paragraph 120 (page 764).

6.3.A. The learned counsel has also referred to paragraph 124 (page 765), paragraph 164 (page 775) [which provides for common entrance test and percentage of seats], paragraph 178 (page 779), paragraph 196 (page 783) [which provides that merit and merit alone should be the basis of selection for the candidates) and paragraph 218 (page 788) [wherein it is specifically stated that in T.M.A. Pai Foundation, this Court in no uncertain terms said that merit would be the first criterion for imparting professional education. It must be given full effect with the aid of these additional reasons).

6.4 In view of the aforesaid judgments of the Apex Court in the cases of T.M.A. Pai Foundation (supra) and Islamic Academy of Education (supra), the petitioners submitted that the judgment of the Apex Court in the case

of Unni Krishnan (supra) is no longer good law. The petitioners, therefore, submitted that the basis of the resolution is the judgment of Unni Krishnan and, once that judgment has been overruled, the Government cannot now insist upon the enforcement of the said circular in this behalf.

6.4.A. The learned counsel has submitted that the impugned communication/order dated 8.8.2003 is passed without giving any opportunity of hearing to the petitioners who are vitally affected persons. In support of the same, the petitioners relied upon the judgment of the Supreme Court in the case of D.K.Yadav vs. J.M. A. Industries Limited, reported in 1993 (3) SCC 259 and the principle laid down therein has been reiterated in other decisions in the case of Bhagwan Shukla vs. Union of India and others, reported in AIR 1994 SC 2480, in the case of State Bank of Patiala vs. K. Sharma, reported in AIR 1996 SC 1669, in the case of Canara Bank and others vs. Debasis Das and others, reported in (2003) 4 SCC 557, and in the case of Union of India and another vs. GTC Industries Limited, Mumbai, reported in (2003) 5 SCC 106.

6.4.B The Supreme Court in the case of D.K. Yadav (supra), in paragraph 12, page 269, observed as under:

6.4.B(i) "12. Therefore, fair play in action requires that the procedure adopted must be just, fair and reasonable. The manner of exercise of the power and its impact on the rights of the person affected would be in conformity with the principles of natural justice. Article 21 clubs life with liberty, dignity of person with means of livelihood without which the glorious content of dignity of person would be reduced to animal existence. When it is interpreted that the colour and content of procedure established by law must be in conformity with the minimum fairness and processual justice, it would relieve legislative callousness, despising opportunity of being heard and fair opportunities of defence. Article 14 has a pervasive processual potency and versatile quality, equalitarian in its soul and allergic to discriminatory dictates. Equality is the antithesis of arbitrariness. It is, thereby, conclusively held by this Court that the principles of natural justice are part of Article 14 and the procedure prescribed by law must be just, fair and reasonable."

6.4.C The Supreme Court in the case of Canara Bank and

others vs. Debasis Das and others, reported in (2003) 4 SCC 557, in paragraphs 13, 14, and 19, observed as under:

6.4.C.(i) "13. Natural justice is another name for common-sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common-sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form.

6.4.C.(ii) 14. The expressions 'natural justice' and 'legal justice' do not present a watertight classification. It is the substance of justice which is to be secured by both, and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves legal justice from unnecessary technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law. As Lord Buckmaster said, no form or procedure should ever be permitted to exclude the presentation of a litigant's defence.

6.4.C.(iii) 19. Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. The expression 'civil consequences' encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life."

6.4.D The petitioners submitted that the aforesaid principle has also been reiterated by this

Court in the judgments in the case of Shankerlal Nagardas Patel vs. Taluka Development Officer, reported in 1997 (1) GLR 793, and in the case of Indrajit Ratilal Shah vs. Jambusar Nagar Panchayat and others, reported in 1998 (1) GCD 730. It is submitted that the impugned order/communication dated 8.8.2003 is passed by the respondent No.1 without authority of law, statute, rule or any enactment framed by the State Government. The impugned order is purported to have been passed under the Government Resolution dated 7.12.1999. Clause 2 of the Government Resolution stipulates action to be taken by three member committee. The impugned order is not passed by three member committee but the same is passed by a single member of the committee in the present case. Therefore, the impugned order/communication dated 8.8.2003 is without jurisdiction, patently illegal and deserves to be quashed and set aside.

6.5. The learned counsel for the petitioners submitted that the petitioners applied for these 15% seats in the year 2002 and they were given provisional admission by the respondent No.4 until committee of three members sit together to finalise the admission. The respondents Nos. 1 and 2 did not send a member to represent the Government in the committee of three members and the petitioners continued to get coaching in the college. The ultimate decision to grant or refuse to grant the admission was required to be taken by the committee of three members after hearing the petitioners. The respondent No.3 had no independent authority to grant or cancel the admission given to the petitioners. Nevertheless, the respondent No.1 usurped the power and passed totally non-speaking order dated 8.8.2003 cancelling the admission granted to the petitioners without giving any opportunity of hearing to the petitioners or even to the college management due to which the respondent No.3 refused to enroll the petitioners.

6.6 The petitioners have further relied upon the judgment of the Supreme Court in the case of S.N. Mukherjee vs. Union of India, reported in, AIR 1990 Supreme Court 1984, and the judgments of this Court in the cases of Laxmidas Mohanlal Patel vs. State of Gujarat, reported in (2002) 3 GCD 1834; Univac Corporation vs. Union of India and others reported in 1993 [1] GCD 491; Diwan Kalusha Ahmedsha and others vs. Mr. Vanikar, Collector of Kaira, reported in 1970 GLR 1009; and The Texteels Ltd vs. N.M. Desai, reported in 1969 GLR 622, wherein the Court has taken a view that every administrative or quasi judicial order should be a

speaking order and it must contain reasons for arriving at a particular conclusion. The petitioners, therefore, relied upon the ratio of decision rendered by the Supreme Court and this Court and submitted that the impugned order/communication dated 8.8.2003 is passed without giving any reasons and the same is totally a non-speaking order in violation of principle of natural justice which has visited upon the petitioners as civil consequences and the same may be quashed and set aside.

6.7 The learned advocate for the petitioners has also relied upon the order dated 21.4.2003 passed by this Court (Coram: A.R.Dave, J.) in Special Civil Application No.4684 of 2003 wherein this Court has observed as under:

6.7.(i) "Looking to the fact that the petitioners have already studied for one complete academic term and they have been given admission as observed by the Honourable Supreme Court in the judgment referred to hereinabove, in my opinion, at this stage, it would not be proper to restrain the petitioners from appearing at the examination in question. It is therefore directed that the petitioners shall be permitted to appear at the examination in question and their result shall be subject to final order which might be passed by this Court in this petition."

6.8 It has been submitted that the above decision of this Court is not further assailed by the Government and the same is accepted by the Government. In fact, the Government has acquiesced in the same.

6.9 The petitioners submitted that by the time the decision was given by the Apex Court, about 70% to 80% seats, both free as well as higher payment seats, were already filled up by allotting students to respectiv colleges by the Centralized Admission System on total 85% seats of each college. It is submitted that remaining 15% seats which were until the delivery of judgment of the Apex Court in T.M.A. Pai Foundation (supra) and which were earmarked as NRI seats and which were left to the disposal of the concerned Management, were only left out to be filled in by the concerned Management. It was further submitted that the petitioners herein are those students who are given admission by the respondent No.4-College as per the ratio laid down by the Apex Court and who are wholly eligible to be given admission in the college and, therefore, the action of the respondent No.3-University of not enrolling the students in spite of the ad-interim order passed by this Court dated 29.1.2004 and confirmed on 26.2.2004 is wholly arbitrary, unjust

and liable to be quashed and set aside.

6.10 The petitioners submitted that the concerned Management of the colleges could have agitated for allowing them to fill up seats in their colleges as per the directions of the Apex Court in T.M.A. Pai Foundation (supra) after 31.10.2002 but in the over all interest of fraternity of students and keeping in view of the fact that about 70% to 80% admission process on the available seats under the Centralized Admission System was already over, the respondent No.4-College decided to fill up only 15% seats on their own without disturbing the admissions granted by the Centralized Admission Committee. It is further submitted that after giving admissions on 15% seats to the petitioners, the Management has forwarded the list of students for enrolment to the respondent No.3-University, but the University refused to accept the same and stated that unless and until the admissions are cleared by the Government on formation of Three Member Committee as per the previous arrangement under the Government Resolution dated 7.12.1999, the University cannot accept the forms and returned the same to the respondent No.4-College. It is further submitted that on 4.12.2002, the Management of the College forwarded the list of students giving all particulars of their merit to the State Government with a request to do needful in the matter.

7. On behalf of the respondent No.4-College, learned advocate Mr. A.R. Majmudar has appeared and reiterated the contentions raised in the affidavit-in-reply filed by Shri Jayesh K. Patel, President of the Trust running the said College, on 6.3.2004. In sum and substance, the respondent No.4-College has supported the case of the petitioners in this behalf. It is submitted that, in view of the judgment of the Apex Court in T.M.A. Pai Foundation (supra), the requirement of selecting students on the basis of merit and the ultimate decision to grant admissions to students who are otherwise qualified for grant of admission must be left with the educational institutions concerned on the seats available to each unaided professional non-minority institutions. Therefore, for all purposes, after the decision of the Apex Court referred to hereinabove, it was open for the Management of the respondent no.4 to grant admission to the present petitioners in the First Year Degree Course in the year 2002 and, accordingly, on the basis of merit, the admissions are given to the petitioners-students in the respondent No.4-College and they are prosecuting their studies since 18.11.2002. It is further submitted that the result of 12th standard examination was declared

some time in the month of May 2002 and, thereafter, the State Government started admission procedure under the Centralized Admission System as per the directions and the scheme framed by the Supreme Court in the decision of Unni Krishnan (supra). While the admission process was in progress, the Apex Court delivered its judgment in T.M.A. Pai Foundation (supra) whereby the private unaided non-minority institutions were given right to choose and select the students who can be admitted to their courses of studies and the scheme framed in the judgment of Unni Krishnan was declared as not correct.

8. On behalf of the Saurashtra University (respondent No.3), learned advocate, Mr. S.P. Hasurkar, has appeared. He has also raised several contentions based on the affidavit-in-reply filed by Shri Gitesh K. Joshi, Registrar, Saurashtra University, on 11th March 2004. In the affidavit-in-reply, while denying the contentions raised by the petitioners, it is submitted on behalf of the respondent No.3-University that, since the respondent No.1-State of Gujarat has denied enrollment of NRI or NRI sponsorship, the University has no other alternative but to reject enrollment of the petitioners. It is pertinent to note that despite the communication dated 8.8.2003, the respondent No.4 admitted the petitioners and, therefore, this Court may not entertain any of the prayers of the petitioners and the interim relief granted vide order dated 29.1.2004 may be vacated because the petitioners cannot claim equity as it is de hors the provisions of law and that too where the respondent No.4 has acted in flagrant violation of the directions given by the respondent No.1 vide letter dated 8.8.2003 at Annexure "F" to the petition. The Centralized Admission Committed has finalized the list of eligible students on 5.11.2003. Thereafter, the respondent No.4, Rajkot Homeopathy Medical College, has forwarded list of 15 students with a request of enrollment. It is pertinent to note that on account of clear instructions and letter from the respondent No.1, the petitioners are not justified in praying any relief as prayed for in the petition. It is submitted that the petitioners have no statutory right or fundamental right in this behalf.

8.1 The Saurashtra University has also filed further affidavit in reply on 25.3.2004. It is submitted that the petitioners have not clearly stated in the memo of the petition as to when the petitioners have applied for admission; whether the petitioners appeared before the Centralized Admission Committee and when the college of the petitioners has forwarded their names for enrollment.

It is the case of the University that all admissions in Homeopathy Medical College including students on NRI quota seats or NRI sponsored seats have to be scrutinized by the Centralized Admission Committee. It is further submitted that the Saurashtra University has enrolled 82 students who are admitted in Rajkot Homeopathy College, Rajkot, way back on 4.2.2003. All these students were admitted through the Centralized Admission Committee. The University received countersigned list of 82 students on 21.1.2003 and vide letter dated 4.2.2003, the deponent of the affidavit in reply has acknowledged the enrollment. Under the circumstances, the petitioners cannot be allowed to pursue their studies. It is not only inequitable but also not in the interest of society at large that these students who have not studied at all and whose terms are not sanctioned by the University could not be allowed to appear into the examination simply on the strength of payment of fees in the College. It is the case of the respondent No.3-University that the University has not received any forms of the petitioners for enrollment.

9. On behalf of the State of Gujarat, respondent No.1, learned Assistant Government Pleader, Miss. Mita Panchal, has appeared. She has also controverted the facts stated by the petitioners in the memo of the petition. In support of the same, she has relied upon the affidavit-in-reply filed by Dr. R.D. Patel, Assistant Director of Indian System of Medicine and Homeopathy, on 16.4.2004. It is submitted that the respondent no.4 is supposed to follow the Government Resolution issued by the Health and Family Welfare Department, dated 7.12.1999 as well as the Government Resolution dated 16.6.1999. It is submitted that 15% NRI quota is fixed but while giving admission on NRI quota, certain norms are required to be followed and that norms are fixed by abovereferred respective resolution and the first criterion which is required to be followed is that even if the students are given admission on NRI quota, they are supposed to secure at least 50% marks i.e. minimum merit criterion which is required to be followed by each institution which are giving admission in NRI quota and further the students must be Std.XII pass with 50% with Physics, Chemistry, Biology and Maths subjects. It is submitted that one of the students, Sunita Verma has cleared Std. XII Science without Maths subject, which is compulsory and, hence, the admission is not as per the provisions of prevailing State Government Rules. It is submitted that, in view of the fact that the judgment of Unni Krishan has been overruled by the Apex Court in the cases of T.M.A. Pai Foundation (supra) and

Islamic Academy of Education (supra), it does not mean that the Institution can be permitted to ignore the minimum eligibility criteria and, hence, this Court should also take appropriate action against the Institution, respondent No.4, for not maintaining the minimum criteria while admitting the students in the present case.

CONCLUSION

10. I have considered the submission of the learned advocate of the petitioners that the State Government has passed the impugned communication/order dated 8.8.2003 without hearing the petitioners and, therefore, it is violative of principles of natural justice. The principle of natural justice has been succinctly set out by the Apex Court in the case of D.K.Yadav (supra). The same principle is reiterated by the Apex Court in the cases of Debasis Das { [2003] 4 SCC 557} (supra) and GTC Industries Ltd. {[2003] 5 SCC 106} (supra).

11. It may be noted that the principle of 'natural justice' has been explained by various Authors:

(i) Honourable Mr. Justice C.K. Thakker on Administrative Law, [First Edition, reprinted in 1996] in Chapter 6 on pages 158 and 159.

(ii) I.P. Massey, on Administrative Law, [5th Edition 2001], in Chapter 6, at page 161, "Practice and Procedure of Administrative Adjudication", has defined 'rules of natural justice'.

(iii) Dr. S.P. Sathe, on Administrative Law, 6th Edition, in Chapter 5, at pages 164 and 165, has discussed the principles of natural justice.

(iv) Prof. H.W.R. Wade on Administrative Law, 7th Edition (1994), Chapter 13, at page 463, has considered the principles of 'procedural justice' and the principle of audi alterm partem at page 494.

(v) De Smith, on Judicial Review of Administrative Action, 5th Edition, 1995, at Chapter 8, more particularly page 401, paragraphs 8-001 and 8-0002, page 415 paragraph 8.032, also considered the principles of natural justice and also on page 486 paragraph 10.016, the learned Author has considered 'duty to act fairly'.

(vi) M.C. Jain Kagzi on the Indian Administrative Law, 6th Edition, 2002, on page 125 at para 3.5, has explained 'fairness' or 'fair procedure' in administrative acton.

(vii) Halsbury's Laws of England, Fourth Edition, 1973,

Vol-1, on Administrative Law, on page 90 at paragraph 74, also discussed the principle of 'audi alteram partem'.

I have consided this principle also over and above the judgments of the Supreme Court in the cases of D.K.Yadav (supra), Debasis Das { [2003] 4 SCC 557} (supra) and GTC Industries Ltd. {[2003] 5 SCC 106} (supra). In view of the catena of decisions and weighty commentaries of various Authors on Administrative Law, in my view, once the impugned communication/order dated 8.8.2003 passed by the State Government directly affects the career of the students, it was incumbent upon the State Government to hear the petitioners-students as well as the College Authorities in this behalf. The impugned decision has been taken without hearing the students as well as the college, which directly affects them. It may be noted that, since November 2002, the petitioners are prosecuting studies whereas the impugned communication/order is passed on 8.8.2003. Therefore, there is delay in passing the impugned order by the Government. In the aforesaid facts and circumstances of the case, in my view, the impugned order dated 8.8.2003 passed by the State Government is, admittedly, without hearing the petitoners whose career has been jeopardized. In my view, it is incumbent upon the State Government to hear both the students and the College Authorities before passing any order.

12. It may be noted that the resolution passed by the State Government is neither legislative action nor subordinate legislative action. By virtue of the resolution, a great prejudice has been caused to the students and their future career is jeopardized. The impugned action of the State Government, by which it determines the future of the students, is said to be a quasi-judicial nature. Thus, the action of the State Government in passing impugned resolution determining the future of the students in such a situation may acquire quashi-judicial character and, therefore, the rules of natural justice are applicable in the present case.

13. It may be noted that the learned advocate for the petitioners has relied upon the judgment of Honourable Mr. Justice A.R. Dave, in identical fact-situation, in the case of which I have referred to earlier. I have been informed by the learned advocate for the petitioners that neither the State Government nor the University has assailed the aforesaid order of this Court any further. However, when the Government hears the petitioners as

well as College Authorities, the Government and/or the Committee will also consider the ratio laid down by this Court in this behalf.

14. On behalf of the State Government, the learned Assistant Government Pleader has contended that some of the petitioners, who have secured admission on NRI seats/NRI sponsored seats, have got marks less than 50% and, therefore, they are not entitled to the admission in question. In view of the fact that the impugned resolution passed by the State Government is without hearing the students and the college and it is violative of principles of natural justice, I am not deciding the aforesaid point in the present writ petition. It will be open to the State Government or the Committee constituted by the State Government to consider this aspect after hearing the students and the college and after considering the principles laid down by the Supreme Court in the cases of T.M.A. Pai Foundation (supra) and Islamic Academy of Education (supra).

15. The resolution dated 8.8.2003 is required to be quashed and set aside as the same was passed without hearing the students as well as the college. However, it will be open to the State Government or the Committee constituted by the State Government to pass fresh orders after hearing the petitioners and the college. The petitioners are entitled to make representation before the Committee and the College Authorities are also entitled to make representation before the Committee in this behalf and, if need arises, the State Government can hear the petitioners as well as the College Authorities. After hearing, the State Government or the Committee may pass a reasoned order in this behalf.

16. In view of the aforesaid position, in my view, the contention raised by the petitioners that the resolution passed by the State Government is based on the judgment of the Unni Krishnan (supra) and the said judgment has been overruled by the Apex Court in T.M.A. Pai Foundation case (supra), and, therefore, the impugned communication/order dated 8.8.2003, based on the said resolution, is vitiated and deserves to be quashed and set aside, does not require to be decided at this stage. It would be open to the State Government to consider the aforesaid contention of the petitioners if the petitioners as well as the College Authorities make representation in this behalf, because, it appears that, when the State Government has passed the impugned communication/order dated 8.8.2003, the State Government was not able to consider the judgments of Apex Court in

the cases of T.M.A. Pai Foundation (supra) and Islamic Academy of Education (supra), which were pronounced by the Apex Court only in August 2003. It would be better if either the State Government or the Committee may consider this latest legal position and then pass an appropriate order after hearing the petitioners and the College Authorities and that would be in the interest of the students and the College in this behalf. It is clarified that this Court is not expressing any opinion on the merit of the matter.

17. In the result, the present writ petition is allowed. The impugned Government Resolution dated 8.8.2003 is quashed and set aside. However, it will be open to the State Government to pass fresh order. If the State Government decides to pass fresh order, then the State Government shall hear the students and the college and, after considering the principles laid down by the Supreme Court in the cases of T.M.A. Pai Foundation (supra) and Islamic Academy of Education (supra), pass an appropriate order in accordance with law, within four months from today. Rule is made absolute with no order as to costs.

(K.M. Mehta, J.)

(swamy)